87-787

No. _____

In the Supreme Court of the United States

October Term, 1987

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

MATTHEW E. JACKSON, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

May a plaintiff in an employment discrimination case survive a motion for summary judgment merely by contesting the employer's legitimate, nondiscriminatory reason for terminating his employment—without presenting any direct or indirect evidence linking his discharge to his race—despite the holdings of four other courts of appeals that, in employment discrimination cases, there must be a causal nexus between the employment decision and the alleged basis of the discrimination?

LIST OF PARTIES

The caption of the case contains the names of all remaining parties in this action. Two additional parties, University officials Wesley W. Posvar and David C. Sullivan, were defendants in the district court and parties on appeal. The district court's grant of summary judgment in favor of these two individuals was affirmed by the court of appeals. Thus, they are no longer parties in this action.

Petitioner, the University of Pittsburgh, has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Petitioner, the University of Pittsburgh ("University"), respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 19, 1987.

OPINIONS BELOW

The August 19, 1987 Judgment and Opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), which is reported at 826 F.2d 230 (3d Cir. 1987), is reprinted in Appendix A hereto at 1a, *infra.*

The June 11, 1986 Judgment of the United States District Court for the Western District of Pennsylvania

granting summary judgment in favor of all defendants, which is not officially reported, is reprinted in Appendix B hereto at 17a, *infra*.

JURISDICTIONAL STATEMENT

The Third Circuit entered its Judgment on August 19, 1987. Its decision is in direct conflict with decisions of at least four other United States courts of appeals concerning the evidentiary burdens under anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). This Court has jurisdiction to review the Judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . .

Title VII provides in relevant part:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race . . . .

42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

In 1982, the University appointed a blue ribbon committee to review and to evaluate its in-house legal department. Following its review and evaluation, the committee recommended that the University develop a centralized,

well-structured office of legal services that was qualified to deal with a broad range of legal matters akin to those dealt with in a large corporate environment. After a nationwide search, the University hired David C. Sullivan as University Counsel, effective January 3, 1983, to carry out the committee's recommendations.

Upon his arrival at the University, Mr. Sullivan inherited a professional staff of two lawyers, one of whom was the Respondent, Matthew E. Jackson, Jr. ("Jackson"). After observing and evaluating the job performance of those two attorneys, Mr. Sullivan determined that Jackson, unlike the University's other Assistant University Counsel, had a number of performance problems.[1] Jackson's performance deficiencies were highlighted by complaints Mr. Sullivan received from Jackson's clients at the University as well as other third-party communications which were critical of Jackson's performance. For example, one client asked Mr. Sullivan to remove Jackson from its matters because of his failure to service them skillfully and promptly:

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[1]The record before the District Court and the Third Circuit contains an abundance of evidence that Jackson's performance as an in-house attorney for the University suffered from at least the following deficiencies: (1) inability to organize his work; (2) failure to complete his work in a timely fashion and to meet deadlines; (3) procrastination which transformed routine tasks into crisis situations; (4) failure to pay careful attention to detail in the preparation and review of documents; (5) unsatisfactory drafting skills; (6) failure to keep the necessary persons informed as to the status and progress of projects; (7) failure to perform and/or to complete all necessary and essential tasks in connection with projects; (8) failure to exercise sound judgment in connection with matters on which he was working; (9) inability to comprehend and to handle complex legal matters and transactions; (10) lack of punctuality and reliability; (11) failure to make suitable arrangements for coverage in his absence; and (12) lack of initiative.

> Matt Jackson simply is not meeting our requirements for legal support in the operations of the Foundation for Applied Science and Technology. This letter requests immediate relief in the form of temporary retention of outside counsel knowledgeable in securities law and long-term relief in the form of assignment to us of counsel capable of handling our affairs more promptly and skillfully.

The letter went on to complain about Jackson's work on a specific project as follows:

> The errors in documentation prepared by Matt for the Hickey-Kober Partnership were numerous and potentially disastrous in consequence . . . [Matt Jackson's] errors of omission and commission of the past week will cost us over $2 million in lost revenues if not corrected immediately.[2]

In late March 1983, Mr. Sullivan had begun to document the various problems that Jackson was having in performing his duties as Assistant University Counsel. On August 15, 1983, Mr. Sullivan sent to Jackson a memorandum outlining his performance problems. Mr. Sullivan also conducted numerous counseling sessions with Jackson and decreased Jackson's work load by assigning matters to outside counsel. Nevertheless, Jackson's performance did not improve to a satisfactory level.

On January 3, 1984, Mr. Sullivan terminated Jackson's employment with the University. Mr. Sullivan replaced Jackson with another black lawyer, Ms. Mary Kennard, who came to the University highly recommended from a position with the National Association of College and University Attorneys.

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[2]This letter is reprinted in Appendix C at 20a, *infra*.

Jackson commenced this suit in the United States District Court for the Western District of Pennsylvania on February 1, 1985.[3] The University sought summary judgment on the race discrimination claim concerning Jackson's discharge because (1) Jackson had failed to establish a *prima facie* case under the standard enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*"); (2) the discharge was motivated by lawful reasons, *i.e.*, Jackson's poor performance; and (3) Jackson had not produced direct or indirect evidence to link his discharge to race. For these reasons, the University urged that it was entitled to summary judgment because there was no genuine issue of material fact.[4] Jackson argued that summary judgment was not appropriate because his deposition testimony challenged the University's articulated reasons for his discharge.

In granting the University's motion for summary judgment, the district court did not address whether Jackson had established a *prima facie* case. Rather, because the University had articulated a legitimate, nondiscriminatory reason for Jackson's discharge, the district court focused its opinion on the third prong of *McDonnell Douglas/Burdine*

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[3]In addition to a race discrimination claim under Title VII and 42 U.S.C. § 1981 against the University concerning his discharge, Jackson's Complaint also contained a number of federal and state law causes of action against two University officials and the University. The Third Circuit affirmed the district court's grant of summary judgment concerning those additional causes of action. Thus, the additional causes of action are not at issue, and will not be addressed, herein.

[4]Jackson also filed a motion for summary judgment, which was denied by the district court. Appendix B at 19a, *aff'd*, Appendix A at 7a-8a n.2.

allocation of proof, *i.e.*, whether the University's articulated reason was "a pretext for discrimination."[5] *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

The district court concluded that Jackson's record evidence did not create a genuine issue concerning whether the University's articulated reason for discharging Jackson was a pretext for discrimination, finding

> no evidence of racial animus but on the contrary noting abundant instances of unsatisfactory work performance which plaintiff's supervisor Sullivan might reasonably regard as sufficient cause for discharge . . . .

Appendix B at 18a.

On appeal, the Third Circuit reversed the district court's grant of summary judgment on Jackson's discharge claim against the University. In so doing, the Third Circuit framed the issue before it as follows:

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[5]In *McDonnell Douglas*, and then again in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) *("Burdine")*, this Court set forth the basic allocations and order of presentation of proof in discrimination cases:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Burdine*, 450 U.S. at 252-53 (citations omitted) (quoting *McDonnell Douglas*, 411 U.S. at 802 and 804).

> The true dispute in this appeal concerns the third stage of the *McDonnell Douglas* method of proof: Has Jackson introduced sufficient evidence to demonstrate the existence of a genuine issue whether [the University's] "proffered justification is merely a pretext for discrimination"?

Appendix A at 8a (quotation in original).

Applying its new "*Chipollini*" standard which allows a plaintiff in a discrimination case to survive summary judgment "without presenting evidence specifically relating to" race,[6] the Third Circuit held that, by contesting the University's evaluation of his job performance, Jackson had properly created a genuine and material issue for trial:

> [T]hroughout nearly 700 transcript pages, Jackson's deposition in numerous ways calls into question [the University's] claims that Jackson was dismissed for performance deficiencies. Jackson's basic position is that he never received any complaints about—and, indeed, that he was often complimented for—his legal work during his years at Pitt... [Such record evidence] suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he was black.

Appendix A at 8a-9a.[7]

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[6]In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.) (en banc), *cert. dismissed*, 56 U.S.L.W. 3183 (1987), the Third Circuit held that "a plaintiff can prevail [at the summary judgment stage in an age discrimination case] by means of indirect proof that the employer's reasons are pretextual *without presenting evidence specifically relating to age*." 814 F.2d at 898 (emphasis added).

[7]In his deposition testimony, Jackson challenged the University's articulated reason for his discharge by asserting, among other things, that Mr. Sullivan "never made specific complaints" about his work and that "he was not the lawyer who was responsible for some of the matters in question." *See* Appendix A at 8a-9a.

Thus, the Third Circuit held that the University was not entitled to summary judgment on Jackson's race discrimination claim even though Jackson produced no evidence linking his discharge to race. In fact, the only evidence Jackson produced relating to race was his *prima facie* case, i.e., he is black and the other Assistant University Counsel who was not discharged is white.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Standard Concerning The Evidentiary Burdens At The Summary Judgment Stage In Discrimination Cases Conflicts With That Of At Least Four Other Courts Of Appeals.

This Court should issue a Writ of Certiorari because a conflict exists between the Third Circuit and at least four other courts of appeals concerning a critically important issue of law: In order to survive summary judgment in a discrimination case in which the employer has articulated a legitimate, nondiscriminatory reason for its action, must a plaintiff offer evidence which links the adverse employment action and the alleged discriminatory basis for it, or may the plaintiff simply attack the proffered reason?

The Third Circuit has held that no nexus need be shown. In contrast, four other courts of appeals have interpreted this Court's statements in *McDonnell Douglas* and *Burdine* as requiring a showing of a discriminatory nexus.

The Third Circuit's decision does not follow this Court's instruction that, under the third stage of the *McDonnell Douglas/Burdine* method of proof, a plaintiff is required to prove that the legitimate, nondiscriminatory reasons articulated by the defendant "were a pretext *for*

discrimination." *Burdine*, 450 U.S. at 253 (emphasis added).

Certiorari should be granted in this case to correct this conflict between the Third Circuit and the other courts of appeals. Otherwise, the Third Circuit's radical change in the evidentiary standards for discrimination cases may affect the outcome of the thousands of employment-related civil rights cases filed each year in the federal courts.[8]

In resolving this conflict, this Court should reject the Third Circuit's standard, not only because it conflicts with the way four other courts of appeals have applied decisions of this Court, but also for three additional reasons:

(1) The Third Circuit's holding applies *Burdine* incorrectly by improperly shifting the plaintiff's burden of persuasion to the defendant at a critically important time in the lawsuit;

(2) The Third Circuit's approach essentially eliminates an employer's opportunity to obtain summary judgment in discrimination cases, contrary to this Court's instruction in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); and

(3) The Third Circuit's approach eliminates the necessity of race-related evidence in a race discrimination case.

The Third Circuit's holding in this case directly conflicts with the decisions from the United States Courts of

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[8]Over 9,100 employment-related civil rights cases were filed in fiscal 1986. Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1986), Table C-2 at 176 and Table C-2A at 179.

Appeals for the First,[9] Fifth,[10] Seventh,[11] and Eleventh[12] Circuits. Unlike the Third Circuit, these other courts have held that a plaintiff cannot survive summary judgment (or meet his ultimate burden to demonstrate unlawful discrimination) merely by introducing evidence which controverts the truthfulness of the employer's articulated reasons for the disputed employment decision. Instead, these other courts of appeals require a plaintiff to link the employment action at issue with the alleged basis of the discrimination claim. In short, they require a discrimination plaintiff to offer proof that the employer's proffered explanation was "a pretext for discrimination," not just that it was not true.

For example, in *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), the First Circuit affirmed summary judgment for the employer, despite the plaintiff's attempts to discredit the employer's articulated reason for the discharge. The court noted that the plaintiff's challenge to the employer's stated justification "merely provide[s] another reason, totally unrelated to age, for his discharge." *Id.* at 15. The First Circuit held that

> evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question.

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[9]*Dea v. Look*, 810 F.2d 12 (1st Cir. 1987); *White v. Vathally*, 732 F.2d 1037 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984).

[10]*Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986).

[11]*Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, __ U.S.__, 107 S.Ct. 954 (1987); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir. 1987).

[12]*Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525 (11th Cir. 1983).

> Plaintiff continues to carry the burden of showing discriminatory intent, and . . . [he] cannot meet his burden of proving "pretext" simply by refuting or questioning the defendants' articulated reason.

Id. (citations omitted). *See also White v. Vathally,* 732 F.2d 1037, 1043 (1st Cir.), *cert. denied,* 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent").

Similarly, the Seventh Circuit in *Dale v. Chicago Tribune Co.,* 797 F.2d 458 (7th Cir. 1986), *cert. denied,* __ U.S. __, 107 S.Ct. 954 (1987), affirmed summary judgment for an employer which had proffered a nondiscriminatory explanation for a discharge. The Seventh Circuit held that a plaintiff "must establish a nexus" between the evidence which purported to show that the employer's explanation was unworthy of credence and age discrimination. *Id.* at 465. Since the plaintiff's evidence in *Dale* did not relate even indirectly to age, and consisted principally of "self-interested assertions" which challenged the prudent business judgment of his supervisors, summary judgment was found to be appropriate. *Id.* at 464-65. *See also Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 559 (7th Cir. 1987) (summarizing the law in the Seventh Circuit as requiring a plaintiff to "show not only a false reason but also a causal chain in which race or another forbidden criterion plays a dispositive role").

The Third Circuit's standard is also in conflict with decisions in at least two other circuits. *See Slaughter v. Allstate Ins. Co.,* 803 F.2d 857, 860 (5th Cir. 1986) (when resisting a summary judgment motion, conclusory allegations by the plaintiff, without more, are insufficient to carry the plaintiff's burden to show that the articulated

reasons served "as a pretext to cloak discrimination"); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983) ("a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability").

Had this case arisen in one of these other four circuits, instead of in the Third Circuit, the result surely would have been different. Like plaintiffs in cases in these other circuits, Jackson's only racially related evidence was that he is black. The balance of his record evidence is "self-interested assertions" challenging his supervisor's judgment and evaluations of his job performance. In this factual setting, it was the Third Circuit's use of the wrong summary judgment standard which led it to issue a holding squarely contrary to the result which would have been reached under the approach used in the four other circuits.

The appropriate standard for summary judgment in discrimination cases is an important issue, as this case illustrates, and it affects thousands of cases per year. It, therefore, would be appropriate for this Court to issue a Writ of Certiorari to resolve the conflict among the circuits on this important issue.

A. *The Third Circuit's Standard Improperly Shifts The Burden Of Persuasion In Discrimination Cases From The Plaintiff To The Defendant.*

Summary judgment is appropriate if the evidence of record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). As this Court emphasized last year in its trilogy of cases examining the burdens of proof and persuasion in summary judgment

proceedings,[13] no genuine issue of material fact remains for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986).

This Court explained that a judge ruling on a summary judgment motion must "view the evidence presented through the prism of the substantive evidentiary burden" that the parties must bear at trial. *Anderson*, 106 S.Ct. at 2513. Thus, if the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden at trial. *See Celotex Corp. v. Catrett*, 106 S.Ct. at 2555.

In a discrimination action, the plaintiff has the burden of persuasion on the issue of discriminatory intent (for example, in this case, the plaintiff must prove that the decision to discharge him was the result of intentional racial bias). *Burdine*, 450 U.S. at 253. Furthermore, at the third stage of the *McDonnell Douglas/Burdine* analysis, the plaintiff must persuade the trier of fact that the defendant's proffered explanation is a "pretext for discrimination." *Id.* Thus, it is the plaintiff who must prove discrimination; the defendant is not required to prove the absence thereof. *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam).

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[13] *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548.

The Third Circuit, however, permits a plaintiff to defeat an otherwise meritorious motion for summary judgment simply by disputing the legitimate, nondiscriminatory reasons proffered by the employer for its actions. The Third Circuit does not require a plaintiff to produce any evidence linking the employment decision at issue to the basis for the discrimination claim. By adopting this standard, the Third Circuit has effectively and impermissibly shifted the burden of persuasion from the plaintiff to the defendant, in clear violation of this Court's holding in *Burdine*.

The effect of this improper shifting of the burden of persuasion on the outcome of discrimination cases is to change the nature of the anti-discrimination statutes. An employer motivated by unpublicized financial problems, a desire to spare the feelings of a loyal or long-term employee, or even nepotism may communicate to a discharged employee an explanation for the decision which is less than brutally frank, even if well intentioned. Under such circumstances, the employer has committed no illegal act under any of the civil rights statutes. Nevertheless, if the employer had explained the discharge as being based upon poor job performance, and if the employee were to allege reasons why he believed that his job performance was not substandard, the plaintiff (in the Third Circuit) could survive summary judgment (assuming an ability to meet the light burden of proving a *prima facie* case) and proceed to trial on a claim of race discrimination, sex discrimination, age discrimination, or all three. The case would proceed to trial (in the Third Circuit) even though there is no evidence that the employee's race, sex or age was a reason for his discharge.

In attempting to minimize the significance of its approach, the Third Circuit offered this advice: "A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d at 899. This advice protests too much because it *admits* that the Third Circuit's approach has the effect of turning federal anti-discrimination statutes into federal codes of good faith and fair dealing. These laws, however, were drafted to prevent discrimination, *Burdine*, 450 U.S. at 259, not to punish employers for not being brutally frank to their employees. Thus, as the Third Circuit itself seems to recognize, its new standard has the result of giving the anti-discrimination laws an effect which was not intended by Congress. This Court, therefore, should issue a Writ of Certiorari to review the Third Circuit standard and to restore the original intent of the anti-discrimination laws.

B. *The Third Circuit's Standard Places Such A Light Burden On A Discrimination Plaintiff That It Essentially Eliminates Summary Judgment For Employers In Discrimination Cases.*

Under the Third Circuit standard, a discrimination plaintiff can survive a motion for summary judgment so easily that summary judgment is essentially eliminated for defendants in employment discrimination cases. As long as the plaintiff raises a factual dispute concerning the employer's proffered reasons, summary judgment would not be appropriate, according to the Third Circuit.

In the instant case, the Third Circuit overturned the district court's grant of summary judgment because Jackson, in his deposition, tendered self-serving statements which disputed the University's evaluation of his job performance. None of Jackson's evidence, however, linked his

discharge to race, either directly or indirectly. He was merely second guessing his employer's evaluation of his work.

The effect of this decision is to permit *every* plaintiff who is discharged for poor performance, and who brings a discrimination action, to avoid summary judgment merely by challenging his employer's assessment of his job performance. This rule stands in clear conflict to the proposition that Title VII "was not intended to 'diminish traditional management perogatives.'" *Burdine*, 450 U.S. at 259 (quotation in original).

More importantly, the Third Circuit's approach effectively eliminates summary judgment in discrimination cases. This result stands in stark contravention to this Court's recent reaffirmation that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 106 S.Ct. at 2555 (quotation in original).

A Writ of Certiorari, therefore, should be granted in this case so that summary judgment can be returned to its integral role in the Federal Rules in discrimination cases arising in the Third Circuit, as well as in ones arising elsewhere in the country.

C. *The Third Circuit's Standard Eliminates The Necessity For Race-Related Evidence In Race Discrimination Cases.*

Under the standard which the Third Circuit applied in this case, a race discrimination plaintiff can avoid summary judgment, can plead his case to the jury and can

ultimately prevail without providing any direct or indirect evidence linking the adverse job action at issue to his race. Instead, a plaintiff in the Third Circuit can secure a favorable verdict merely by raising a factual dispute about the employer's stated nondiscriminatory reasons for an employment decision.

Federal anti-discrimination statutes, however, including Title VII, do *not* impose (and were never intended to impose) upon employers the burden of establishing a just or proper cause for their personnel actions. Rather, they are statutes which were enacted to remedy only a certain narrowly-defined type of employment decisions—ones which are based upon a statutorily-prohibited reason (such as race, age, or sex).

In these discrimination cases, it is critical that the plaintiff prove not only that something adverse happened to him, but also that it happened to him *because of* his race, age, or sex. This Court acknowledged the importance of this nexus in *Burdine*, as have four other courts of appeals which have addressed the issue.

The Third Circuit, however, has adopted an approach which incorrectly eliminates the proof of race discrimination from a race discrimination case. This error is so important that intervention by this Court is appropriate.

For these and the other reasons set forth above, this Court should grant the petition, issue a Writ of Certiorari, reverse the Third Circuit, and reiterate that a plaintiff in a discrimination case must produce more than a factual dispute with his employer's articulated reasons for a job action in order to survive summary judgment. Instead, such a plaintiff must establish some nexus between the

employment action at issue and the alleged basis of discrimination, as four other courts of appeals which have addressed this issue have held.

CONCLUSION

In order to resolve this conflict between the Third Circuit and four other courts of appeals, and for all of the other foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 13, 1987

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-3391

MATTHEW E. JACKSON, JR.,

Appellant

v.

UNIVERSITY OF PITTSBURGH, DAVID C. SULLIVAN and WESLEY W. POSVAR, in their official and individual capacities

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL ACTION NO. 85-264)

Argued
February 11, 1987

Before: HIGGINBOTHAM and STAPLETON, *Circuit Judges,* and RODRIGUEZ, *District Judge.**

(Filed August 19, 1987)

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* Honorable Joseph H. Rodriguez, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal requires us to determine whether summary judgment was properly granted for the defendants-appellees in an employment discrimination case. Because record evidence demonstrates the existence of genuine issues of material fact that must be resolved at trial, we determine that, in part, it was not properly granted. We therefore will reverse the judgment of the district court on appellant's federal claims concerning his discharge and remand them for trial.

I. Background

Appellant Matthew E. Jackson, Jr., who is black, was hired on July 15, 1975 by appellee the University of Pittsburgh ("Pitt") to work as an attorney in its legal department, Jackson continued in this position until January 3,

1984, when he was discharged by appellee David C. Sullivan, who had then been Pitt's general counsel, and Jackson's supervisor, for one year. Jackson thereafter filed an internal grievance with Pitt concerning his termination; he also complained to the Pennsylvania Human Relations Commission ("PHRC"), the Equal Employment Opportunity Commission ("EEOC") and the Office of Federal Contract Compliance Programs ("OFCCP"), that his discharge was racially motivated.[1] On February 1, 1985, Jackson commenced this action, alleging federal claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1982), and Section 1981 of the Civil Rights Act of 1866 and the Voting Rights Act of 1870, 42 U.S.C. § 1981 (1982), and pendent state claims. After discovery and a hearing, the district court denied Jackson's motion for summary judgment and entered summary judgment for appellees. *Jackson v. University of Pittsburgh,* No. 85-0264 (W.D. Pa. June 11, 1986). This appeal followed. Our jurisdiction is conferred by 28 U.S.C. § 1291 (1982).

II. The Governing Law

We review grants and denials of summary judgment by applying the same test a district court should employ. *Marek v. Marpan Two, Inc.,* 817 F.2d 242, 244 (3d Cir. 1987); *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977); *see generally Bushman v. Halm,* 798 F.2d 651, 656-57 (3d Cir.

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[1]On December 20, 1984, the OFCCP concluded that "[n]o elements of race consideration were found in complainant's termination." Appendix for Appellant ("App.") at 838. The record also indicates that Jackson withdrew his PHRC and EEOC charges before either of those agencies had made a determination. *See id.* at 529, 531 (Deposition of Matthew E. Jackson, Jr.). Jackson did, however, receive right to sue letters from these agencies on November 11, 1984, and December 17, 1984, respectively. Brief for Appellant at 27.

1986). Rule 56 permits a district court to grant a summary judgment motion only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Fed. R. Civ. P.** 56(c). A disputed factual matter is a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2510 (1986). "Material" facts are those "that might affect the outcome of the suit under the governing law . . . ." *Id.*

> Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt.

Goodman, 534 F.2d at 573 (footnote omitted).

In a federal discrimination case such as this one, the governing law includes the "method of . . . presumptions and shifting burdens of production" set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) (*"McDonnell Douglas"),* and its progeny. *Dillon v. Coles,* 746 F.2d 998, 1003 (3d Cir. 1984).

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's [dismissal]." Third, should the defendant carry this burden, the plaintiff

> must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (*"Burdine"*) (quoting *McDonnell Douglas*, 411 U.S. at 802); *see generally Robinson v. Lehman*, 771 F.2d 772, 777 n.13 (3d Cir. 1985); *Kunda v. Muhlenberg College*, 621 F.2d 532, 541-43 (3d Cir. 1980).

This Court noted recently, in the context of a federal age discrimination claim, that "a defendant's burden of production as the moving party on summary judgment generally is to show that the plaintiff cannot meet his [or her] burden of proof at trial." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 895 (3d Cir. 1987) (in banc), *petition for cert. filed*, 56 U.S.L.W. 3013 (U.S. July 14, 1987) (No. 86-2007). This burden on the moving defendant is not satisfied, however, "merely by showing the plaintiff's inability to prove by *direct* evidence that the defendant's proffered reason is a pretext for . . . discrimination." *Id.* (original emphasis). At the summary judgment stage, in other words, "all that is required [for a non-moving party to survive the motion] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve [at trial] the parties' differing versions of the truth . . . ." *First Nat'l Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 288-89 (1968). Further, because

> intent is a substantive element of this cause of action—generally to be inferred from the facts and conduct of the parties—the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve *any* genuine issues of credibility.

Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981) (original emphasis).

III. Appellees' Motion for Summary Judgment

Appellee's motion for summary judgment, which the district court granted, sought judgment in its favor "in all respects." App. at 791. Thus, while the district court's brief opinion is less than clear in explaining the precise claims to which its order applies, we have concluded that the district court entered summary judgment for appellees on Jackson's Title VII and Section 1981 claims concerning his discharge, on his similar federal claims concerning Pitt's processing of his grievance, and on his pendent state claims alleging fraud, defamation and invasion of privacy. We will address these distinct summary judgments in that order.

A. Pitt's Discharge of Jackson

Appellees make no contention that Jackson has failed to establish a prima facie case under the *McDonnell Douglas* method of proof. We note that (i) he belongs to a racial minority; (ii) he was employed as one of Pitt's in-house attorneys and was qualified for that position; (iii) he was discharged from that position; and (iv) his co-workers, who are white, were not discharged. The district court correctly found that Jackson established a prima facie case . *See McDonnell Douglas,* 411 U.S. at 802; *Bellissimo v. Westinghouse Elec. Corp.,* 764 F.2d 175, 179-80 (3d Cir. 1985) ("A plaintiff alleging a discriminatory firing need only show that he [or she] was fired from a job for which he [or she] was qualified while others not in the protected class were treated more favorably . . . . Proof of discharge will establish a prima facie showing in a Title VIi suit."), *cert. denied,* __U.S. __, 106 S. Ct. 1244 (1986). Jackson, in

other words, carried his "initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under [Title VII].' " *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 576 (1978) (*"Furnco")* (quoting *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 (1977)); *cf. EEOC v. Hall's Motor Transit Co.,* 789 F.2d 1011, 1015 (3d Cir. 1986) ("an employer's decision to discharge an employee may superficially appear to be justified by legitimate business reasons and yet [may] have been motivated by racial prejudice").

Under *McDonnell Douglas,* appellees have also fulfilled their ensuing burden of production "to articulate some legitimate, nondiscriminatory reason" for Jackson's dismissal. 411 U.S. at 802. The summary judgment record now before us includes depositions, affidavits, documents and other evidence supporting appellees' position that Jackson "was simply a poor performer," Brief of Defendants-Appellees at 21, who was, accordingly, dismissed from his job.[2]

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[2]At the same time the district court granted appellees' motion for summary judgment, it also denied Jackson's contemporaneous motion for summary judgment. Jackson separately appeals the denial of his summary judgment motion, claiming that, at stage two of the shifting *McDonnell Douglas* burdens, appellees failed to articulate a legitimate, nondiscriminatory reason for their challenged acts. In reality, however, this aspect of Jackson's appeal amounts to a claim that appellees' proffered reasons for terminating him are unsupported by a preponderance of the evidence and therefore are not worthy of credence. *See* Brief for Appellant at 39-46. We conclude that any such assessment must be made by the factfinder at trial; "[a]t the summary judgment stage, 'the judge's function is not . . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812

(Continued on next page)

The true dispute in this appeal concerns the third stage of the *McDonnell Douglas* method of proof: Has Jackson introduced sufficient evidence to demonstrate the existence of a genuine issue whether appellees' "proffered justification is merely a pretext for discrimination"? *Furnco,* 438 U.S. at 578. The district court concluded that Jackson's record evidence does not create such an issue; it "f[ound] no evidence of racial animus but on the contrary not[ed] abundant instances of unsatisfactory work performance [by Jackson that Sullivan] might reasonably regard as sufficient cause for discharge . . . ." *Jackson,* No. 85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986).

We reject the district court's conclusion. The record, including Jackson's lengthy deposition, contains more than "a scrap of evidentiary material to support h[is] argument." *Alizadeh v. Safeway Stores, Inc.,* 802 F.2d 111, 113 (5th Cir. 1986). Instead, throughout nearly 700 transcript pages, Jackson's deposition in numerous ways calls into question appellees' claims that Jackson was dismissed for performance deficiencies. Jackson's basic position is that he never received any complaints about—and, indeed, that he was often complimented for—his legal work during his years at Pitt. *E.g.,* App. at 59, 427, 482-84, 527 (Deposition of Matthew E. Jackson, Jr.). Jackson also claims that Sullivan in particular never made specific complaints or gave Jackson "facts about anything," *id.* at 234 (same); that Sullivan, after discharging Jackson, began to solicit complaints about his work by calling "numerous individuals" at Pitt, *id.* at 352 (same); that Sullivan, after discharging Jackson, was seen "walking around the halls like a wild

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(Continued)
F.2d 141, 144 (3d Cir. 1987) (quoting *Anderson,* ___ U.S. at ___, 106 S. Ct. at 2511). Accordingly, we will affirm the district court's denial of Jackson's motion.

man," *id.* at 283 (same), "talking about he was going to ruin [Jackson's] reputation and destroy [him]," *id* at 286 (same); and that Sullivan told Jackson's attorney "that [Sullivan] would ruin and destroy [Jackson,] . . . something to the effect that [Jackson] would never be able to practice law in Pittsburgh again."[3] *Id.* at 360-61 (same). As a whole, such record evidence is more than sufficient to support the reasonable inference that Sullivan's criticisms of Jackson's performance are post hoc concoctions. It also suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he was black. In refusing to draw such obvious inferences, and thus in entering summary judgment for appellees, it appears that the district court "invaded forbidden territory" that is reserved for a factfinder at trial. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

Additionally, as to the substantive legal tasks that appellees allege Jackson mishandled during his years of employment at Pitt, Jackson counters with claims that he was not the lawyer who was responsible for some of the matters in question, App. at 111-12 (Deposition of Matthew E. Jackson, Jr.), and that Sullivan refused Jackson's requests to bring in outside counsel to handle other specialty matters. *Id.* at 546-50 (same). In addition, Jackson claims that he was the only attorney in the office who had no secretary, *id.* at 63-64; 87, 96, 137, 542 (same), and that he alone was denied the assistance of less-experienced legal staff members who were otherwise available. *Id.* at 205-06,

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[3]We also note Sullivan's alleged statement of "hope [that Jackson] doesn't think the black judges can help him." App. at 52a (Deposition of Matthew E. Jackson, Jr.); *see also id.* at 284 (same).

542-44 (same). Such evidence supports the reasonable inference that Jackson was treated less favorably than his white colleagues in ways that could explain any "deficiency" in his performance. *Cf. Bellissimo,* 764 F.2d at 180 (trial court finding that Ms. Bellissimo proved pretext was "clearly erroneous because [she] failed to make any showing of disparate treatment and because [defendant] proved that its male attorneys were treated the same as she in the disputed areas"). It suffices, in short, to raise a genuine issue of fact whether Jackson's dismissal really had anything at all to do with his performance.

We make no claim to believe or to disbelieve Jackson's evidence. That, we emphasize, is wholly the province of the factfinder at trial. *See Bushman,* 798 F.2d at 660 ("While plaintiff's credibility may be challenged by opposing counsel at trial, it is not the function of the court to assume the role of the factfinder upon summary judgment."); *Graham v. F.B. Leopold Co., Inc.,* 779 F.2d 170, 173 (3d Cir. 1985) ("What the district court chooses to infer or chooses not to infer is simply not relevant to consideration of a summary judgment motion."); *Fireman's Fund Ins. Co.,* 540 F.2d at 1178 ("[i]t is the function of the trier of fact alone .... to evaluate contradictory evidence"). We do note, and by reciting the deposition evidence in such detail we mean to demonstrate, however, that a factfinder reasonably could conclude that appellees' position is mere pretext. Jackson's opposition to the summary judgment motion was therefore not based only upon "t[he] bare-bone allegations in h[is] brief and pleadings .... " *Alizadeh,* 802 F.2d at 113; *cf. Sola v. Lafayette College,* 804 F.2d 40, 45 (3d Cir. 1986) (affirming summary judgment where plaintiff "produced no evidence [beyond her allegations] that she was denied tenure in part based on

her gender"); *accord Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1218 (7th Cir. 1980) (per curiam) (affirming summary judgment for employer in age discrimination case where "the subsidiary facts plaintiff put forward as evidence . . . [gave] no indications of motive and intent, supportive of his position, to put on the scales for weighing [-i]t was a wholly empty case"), *cert. denied*, 450 U.S. 959 (1981); *Pierce v. New Process Co.*, 580 F. Supp. 1543, 1546 (W.D. Pa.) (granting summary judgment for employer in age discrimination case where "plaintiff [was un]able to present any facts to indicate pretext or discriminatory intent"), *aff'd*, 749 F.2d 27 (3d Cir. 1984). It was, rather, based upon his own evidence and comprehensive testimony, and was sufficient to withstand the motion for summary judgment. *See J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 617 (3d Cir. 1987) (where "reasonable minds could differ[,] . . . an issue of material fact remains . . . for the trier of fact"); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 732 (9th Cir. 1986) (race discrimination plaintiffs relied upon evidence including "their declarations" to survive employer's summary judgment motion); *Walters v. President & Fellows of Harvard College*, 645 F. Supp. 100, 102 (D. Mass. 1986) (*"plaintiff's contentions* . . . [placed] the underlying facts . . . sufficiently in question that summary judgment is not warranted") (emphasis added).

Appellees' central argument in this appeal—a position that the district court appeared to adopt in granting their motion for summary judgment—is that Jackson's deposition, because it is his only record evidence, is insufficient to create a genuine factual issue on the ultimate question of race discrimination. This position relies upon our decision in *Molthan v. Temple Univ.*, 778 F.2d 955 (3d Cir.

1985), affirming the entry of judgment for the defendant in a Title VII sex discrimination suit. In *Molthan,* "we agree[d] with the district court that no evidence was adduced from which a jury could reasonably have inferred that sex discrimination played any part in the denial of [plaintiff's] promotion," and we concluded that plaintiff's evidence there "was insufficient as a matter of law to warrant any [such] inference . . . ." *Id.* at 962. We did not hold, however,—contrary to appellees' assertions and oral argument before this Court—that a discrimination plaintiff must offer "some evidence other than [his or] her own subjective belief" or "put on at least one other witness other than [himself or] herself" before his or her case will survive motions for summary judgment and/or directed verdict,[4] and we explicitly reject any intimations to the contrary. There is simply no rule of law that provides that a discrimination plaintiff may not testify in his or her own behalf, or that such testimony, standing alone, can never make out a case of discrimination that will survive a motion for summary judgment.

In today's climate of public opinion, blatant acts of discrimination—the true "smoking guns"—can easily be identified, quickly condemned and often rectified in the particular settings where they occur. Much of the discrimination that remains resists legal attack exactly because it is so difficult to prove. Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. That is one of the reasons why our legal system permits discrimination plaintiffs to "prove [their]

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[4]Although the oral argument has not, to our knowledge, been transcribed, these quotations from appllees' argument were obtained with care from the Court's audio tape.

case[s] by direct or *circumstantial evidence." United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714 n.3 (1983) (emphasis added); *accord Maxfied v. Sinclair Int'l,* 766 F.2d 788, 791 (3d Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S. Ct. 796 (1986); *Lewis v. University of Pittsburgh,* 725 F.2d 910, 919 n.10 (3d Cir. 1983), *cert. denied,* 469 U.S. 892 (1984). This record, unlike that in *Molthan,* contains both circumstantial evidence and Jackson's direct evidence from which a jury could reasonably infer that Jackson's performance as a lawyer was not deficient, that appellees' claims to the contrary are mere pretext, and that race discrimination played a role in Jackson's discharge.[5] Therfore, because "the issue of pretext turns on [Jackson']s credibility[, it] is not appropriate for resolution on a summary judgment motion." *Chipollini,* 814 F.2d at 901; *accord Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 865 (3d Cir. 1986) (where "record contains more than simple accusations and speculation[,] . . . there is sufficient evidence to put [the employer's] motivation in issue"); *cf. Attorney Gen. of the United States v. Irish People, Inc.,* 796 F.2d 520, 523 (D.C. Cir. 1986) (per curiam) (Bork, Scalia and Gesell, JJ.) ("affidavits from [nonmovant organization's] officers and staff," which "District Court dismissed . . . as conclusory and lacking particularity, . . . were adequate to raise a genuine issue of fact in light of the nature of the Attorney General's evidence and the issue involved").

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[5]This is the record evidence and the inferences drawn therefrom that a court is not, at the summary judgment phase, free to minimize, much less disbelieve. *Molthan,* which was not a summary judgment case, did, by contrast, involve our Court's refusal to credit evidence—allegations that defendants there made a number of sexist comments—that "[t]he district judge did not believe . . . ." 778 F.2d at 962 n.1.

B. Pitt's Handling of Jackson's Grievance

Count II of Jackson's complaint alleges that Pitt, in processing Jackson's grievance, intentionally deviated from the provisions of its *Staff Handbook,* provisions that Pitt had previously represented as applying to all of its employees, and that this deviation itself was racially motivated, in violation of Title VII and Section 1981. *See* App. at 11. Appellees answer, *inter alia,* that Jackson, who held a nonclassified staff position at Pitt, is not covered by the handbook's grievance procedure for classified employees. On appellees' motion for summary judgment, the district court denied Jackson's claim, which it called a "procedural due process" claim, accepting instead appellees' arguement that Jackson is not covered by the *Staff Handbook* procedure.[6] *Jackson,* No. 85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986).

Jackson has not addressed this aspect of the district court's judgment in either of his briefs or in his oral argument to this Court. Accordingly, we conclude that it has not been appealed. *See generally Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,* 755 F.2d 38, 40 n.2 (3d Cir.), *cert. denied,* ___ U.S. ___, 106 S. Ct. 67 (1985).

C. Jackson's Pendent Claims

After disposing of Jackson's federal claims, the district court asserted that it was within "its discretion [to] decline to consider the pendent State claims . . . ." *Jackson,* No.

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[6]The district court found that "the grievance procedure upon which plaintiff relies is applicable only to classified employees whose code numbers appear in a specified list of job titles, which does not include plaintiff's job." *Jackson,* No. 85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986).

85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986). Convinced that these pendent claims "raise[d] no peculiarly difficult or doubtful questions of State law [that] should be reserved for disposition by State courts," *id.*, however, the district court also granted appellees' motion for summary judgment on these claims.

We conclude that this aspect of the district court judgment also has not been appealed. The only reference to these claims is the final words on the final page of Jackson's brief, which asks us to remand "for trial on the pendent state claims." Brief for Appellant at 50. This is insufficient to put the issue before us. *See* **Fed. R. App. P.** 28(a)(2) (appellant's brief must contain a statement of the issues presented for review); *cf. Brown v. Sielaff,* 474 F.2d 826, 828 (3d Cir. 1973) (per curiam) (citing Rule 28 for the proposition that, where the "appellant has not pressed a point in this appeal, we are unable to notice it"). Further, these claims are not addressed at all in Jackson's Reply Brief and were not raised in the course of his oral argument. Accordingly, under the law of this Circuit, he has "waived this issue on appeal." *Delaware Valley Citizen's Council For Clean Air,* 755 F.2d at 40 n.2 (issue "not addressed in appellant's brief, reply brief or at oral argument"); *accord Lugar v. Texaco, Inc.,* 755 F.2d 53, 57 n.2 (3d Cir. 1985); *NLRB v. Wolff & Munier, Inc.,* 747 F.2d 156, 167 (3d Cir. 1984) (Sloviter, J., dissenting); *Battle v. Pennsylvania,* 629 F.2d 269, 271 n.1 (3d Cir. 1980), *cert. denied sub nom. Scanlon v. Battle,* 452 U.S. 968 (1981).

IV. Conclusion

For the foregoing reasons, we will affirm the district court's denial of appellant's motion for summary judgment. We will reverse the district court's entry of summary

judgment for appellees on appellant's federal claims concerning his discharge and remand them for trial on the merits. Costs will be taxed against appellees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW E. JACKSON, JR.,
Plaintiff,

v.

UNIVERSITY OF
PITTSBURGH, *et al.*

Civil Action
No. 85-0264

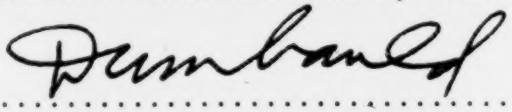
JUDGMENT

AND NOW, this 11th day of June, 1986, upon consideration of cross-motions for summary judgment and of briefs in support thereof and in opposition thereto, and of other affidavits, depositions, and documents of record, after argument; and it appearing that plaintiff's action is for unlawful discharge as assistant counsel of the University of Pittsburgh allegedly because of his race and color, pursuant to 42 U.S.C. 2000e-2(a) ("Title VII") and 42 U.S.C. 1981 [1983] ("Civil Rights"), and denial of procedural due process, together with pendent State claims for breach of contract, fraud, defamation and invasion of privacy; and the Court being of opinion that under the schema of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-805 (1973), and its progeny, the crucial issue here is whether defendants' articulated legitimate reasons for discharging plaintiff were pretextual and constituted mere subterfuge; and that plaintiff must ultimately prove that racial reasons were the true motivation for his discharge [*Alexander v. Northern Arizona Counsel of Governments,* 447 F. Supp. 1364, 1367 (D. Ariz. 1978); *Flucker v. Fox Chapel Area School Dist.,* 461 F. Supp. 1203, 1204,

1205 (W.D. Pa. 1978); and the Court finding no evidence of racial animus but on the contrary noting abundant instances of unsatisfactory work performance which plaintiff's supervisor Sullivan might reasonably regard as sufficient cause for discharge under the "new broom" tight-ship regime of high-quality low-cost legal service prescribed by Sullivan as the remedy for Pitt's excessive expenses for legal services formerly paid to down-town law firms (one striking example being plaintiff's lack of diligence in effectuating a bequest to the University where the Dilworth firm of Philadelphia wrote two letters urging completion of the transaction); and the Court finding no denial of procedural due process, since the grievance procedure upon which plaintiff relies is applicable only to classified employees whose code numbers appear in a specified list of job titles, which does not include plaintiff's job; and while the Court might in its discretion decline to consider the pendent State claims, yet they seem to raise no peculiarly difficult or doubtful questions of State law which should be reserved for disposition by State courts; and the Court being of opinion that no contractual action of assumpsit of fraud is established; and that no actionable defamation or invasion of privacy has been shown, the Court being of opinion that it is ordinary prudence to keep a so called "secret file" such as Sullivan did, in order to be prepared for the spate of wrongful discharge cases likely to arise whenever a person of protected race, age, or sex is discharged, or even for any discharge of an employee at will since the decision in *Novosel v. Nationwide Ins., Co.*, 721 F. 2d 894 (C.A. 3, 1983), and that keeping such data is no evidence of wrongful animus or racial discrimination; and the Court being of opinion that the data regarding plaintiff's performance was not disseminated to persons other than those having a reasonable connection either with the

termination process itself or with the climate of opinion on black issues which was appropriately kept informed in order to protect the image of the University and to justify and defend Sullivan's and Posvar's actions against any suspicions or allegations of racism; and that accordingly defendants are entitled to the defenses of non-publication, privilege, or statute of limitations as applicable to the particular statements charged as defamatory or as invading privacy; and the Court therefore being of opinion that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law;

IT IS ORDERED, ADJUDGED, DECREED, AND FINALLY DETERMINED that plaintiff's motion be and the same hereby is denied; that defendants' motion be and the same hereby is granted, and that judgment be and it hereby is entered in favor of defendants University of Pittsburgh, David C. Sullivan, and Wesley W. Posvar, in their official and individual capacities, and against plaintiff Matthew E. Jackson, Jr., each party to bear its own costs and attorney fees.



United States Senior District Judge

APPENDIX C

BUSINESS AND HIGHER EDUCATION
PARTNERS IN PROCESS

Foundation for Applied Science and Technology

December 5, 1983

Mr. David C. Sullivan, Esq.
University Legal Counsel
3201 Cathedral of Learning

Dear David:

Matt Jackson simply is not meeting our requirements for legal support in the operations of the Foundation for Applied Science and Technology. This letter requests immediate relief in the form of temporary retention of outside counsel knowledgeable in securities law and long-term relief in the form of assignment to us of counsel capable of handling our affairs more promptly and skillfully.

Specifically, we have two Research and Development Limited Partnerships which must be processed within the next several days. Follow up on these may continue through most of December. I request that you assign Alan Finegold of Kirkpatrick, Lockhart, Johnson & Hutchison, to provide needed legal counsel in these matters. We also require continuing and *prompt* assistance in working out our Memorandum of Understanding with the University, Confidentiality Agreements, contract documents, etc. To date, our support has been lacking in both responsiveness and precision.

The precipitating events leading to this request include the following:

1) Matt promised the attorneys for Hickey-Kober Inc., the Partnership syndicator, a package of data by, Wednesday, 30 November. That package was finally mailed—incomplete and incorrect—on Friday, 2 December.

Judgments relating to quality of legal services may be subjective, but issues of effort and promptness are not. Matt told me that you had him tied up on another assignment on Friday morning when he arrived here at approximately 11:30 AM for a meeting scheduled for early Friday morning. You have told me this was not the case. His absence during this critical period had a devastating effect on the quality of our preparation.

2) The errors in documentation prepared by Matt for the Hickey-Kober Partnership were numerous and potentially disasterous in consequence. For example; he proposed an option for the Foundation to be exercised if a similar option was not exercised by another party within one year. His proposal had that party notify FAST of its intent not to exercise on January 30, 1985 with FAST required to exercise on January 30, 1985. He also listed the distribution of royalties during one phase of commercial exploitation as

a) Until the net proceeds equal the initial investment of the Limited Partners

   1.) 60% to the Partnership
   2.) 40% to Scopas and FAST in accordance with the provisions of paragraph 7, below

b) Until the Limited Partners receive and additional amount equal to eight (8) times their initial investment

   1.) 3% to the Partnership

2.) 97% to Scopas and FAST in accordance with the provisions of paragraph 7

c) Thereafter, perpetual payments will be made

1.) 1% to the Partnership

2.) 99% to Scopas and FAST allocated in accordance with the provisions of paragraph 7

whereas the correct distribution is

a) 6% of net proceeds until the partners recover their initial investment

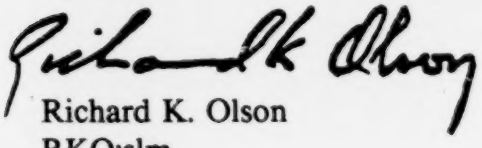
b) 3% of net proceeds until the partners have received a total of eight times their initial investment

c) Thereafter, 1% in perpetuity.

A draft of the document referred to above is attached. Please note that this is not the first draft. It contains several corrections of errors which were contained in earlier drafts, yet there are still errors in items 2, 3, 4, 5 and 7.

Since he has commenced to work on Foundation business, Matt has stated that your assignment of his time to other University business has prevented his concentration on meeting our requirements. I cannot judge the accuracy of these excuses. I do know that we need more prompt and effective legal assistance. The errors of omission and commission of the past week will cost us over $2 million in lost revenues if not corrected immediately.

Sincerely,



Richard K. Olson
RKO:slm
Attachments